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JAMES H. McKENNEY,
Clerk

In the

SUPREME COURT OF THE UNITED STATES.

ALBERT K. HISCOCK, Trustee in Bankruptcy of JACOB M. MERTENS, *et al.*,

*Petitioner,*

vs.

JACOB M. MERTENS,

*Respondent.*

**Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.**

J. P. Fralick, Law Case Printer, 100 Wieting Blk.
Syracuse, N. Y.

In the

**SUPREME COURT OF THE UNITED STATES.**

ALBERT K. HISCOCK, TRUSTEE IN BANKRUPTCY OF JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS AND EDMUND A. MERTENS, INDIVIDUALLY AND AS COMPOSING THE CO-PARTNERSHIP FIRM OF "J. M. MERTENS & Co.," BANKRUPTS,

*Petitioner,*

vs.

JACOB M. MERTENS,

*Respondent.*

Petition for writ of certiorari to the United States Circuit Court of Appeals, for the Second Circuit, requiring it to certify to the Supreme Court of the United States for its revision and determination the petition for review in bankruptcy taken by said Jacob M. Mertens against Albert K. Hiscock, as trustee in bankruptcy of said Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mertens, individually and as composing the co-partnership firm of "J. M. Mertens & Co.,"

bankrupts, In the Matter of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mertens, individually and as composing the co-partnership firm of "J. M. Mertens & Co.," bankrupts, lately depending in said Circuit Court of Appeals.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Albert K. Hiscock, trustee in bankruptcy of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mertens, individually and as composing the co-partnership firm of "J. M. Mertens & Co.," bankrupts, filed under the provisions of Section 25-d of the Bankruptcy Act of 1898, respectfully represents as follows:—

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A review of the decision below is asked in brief, because:

1. Said decision by the Second Circuit is absolutely contrary to the decision of the same question by the Seventh Circuit.

2. As shown by its opinion, the Court below was not satisfied that its decision was just or correct, and in effect asked this Court to review.

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3. The Supreme Court has not decided the question.

4. The same question arises in many bankruptcy proceedings, and is of great importance to the creditors of bankrupts generally and also to bankrupts themselves.

To substantiate the grounds briefly set forth above, the petitioner represents:

A reference to the opinions of the Special Master (R. p. 132), the District Court for the Northern District of New York (R. p. 152), and the Circuit Court of Appeals for the Second Circuit (R. p. 193), will show conclusively that the ruling of the latter Court should be reviewed. 7

This cause involves a question entirely novel and one of the most vital importance arising under the Act of 1898—a question which will arise in many bankruptcy proceedings and upon the decision of which will depend the ownership of a vast number of so-called life insurance policies, to wit, policies of the tontine or semi-tontine variety, which policies are very common and which are held by debtors to great amounts in different parts of the United States, and which are of great value. The question to be determined is as to whether such so-called tontine life insurance policies, which not only by their terms fail to provide for a cash surrender value, but which also have, because of their peculiar "tontine" nature, a large actual value, a value much greater than can be obtained from the insurance company issuing the same, come within the provise of Section 70-a-5 of said Bankruptcy Act. Said section is printed at page 194 of the Record. 8

At the time of the filing of the petition in bankruptcy herein, August 18, 1903, Jacob M. Mertens was the owner of four so-called insurance policies, all of the tontine variety, all issued by the Equitable Life Assurance Society of New York. In one of them it is admitted that the trustee has no interest, (R. Fol. 400) and 9

consequently it will not be spoken of again. Of the three other policies aggregating in amount $90,000, all in case of death were payable to Mr. Mertens' estate, and in case he continued to live, the options of which we shall here-
10 after speak and which are of great importance to a consideration of the question involved, were in favor of him alone. The expiration of the tontine period, meaning thereby the time when the option became enforceable by the insured, was in each case twenty years from the date of the policy. The policies appear in the Record at pages 77, 85 and 93. One policy, No.274,445, was issued March 8, 1884, in the amount of $20,000 with a semi-annual premium of $293; another, No. 415,768, was issued January 23, 1889, in the amount of $20,000, with an annual premium of $684; the other, No.
11 417,171, was issued February 15, 1889, in the amount of $50,000, with a semi-annual premium of $791.50.

It will be noted that these policies are *"tontine"* policies. The peculiar nature of a tontine policy is hereafter discussed and is of vital consequence to a proper consideration of the issue.

After the adjudication, it appeared that Mr. Mertens, the bankrupt, claimed that these policies were embraced within the proviso contained in Section 70-a-5 of the Bankruptcy Act, and that he claimed to be entitled to
12 hold the same free from all claims of creditors upon paying to the trustee the amount of what he alleged was the cash surrender value thereof. Thereupon the trustee presented a petition to the District Court (R. p. 17) upon notice (R.p.15) claiming that the bankrupt had on right nor interest in said policies, asking for an order requir-

ing said Mertens to execute and deliver to the trustee an assignment of said policies and also asking that the rights of said bankrupt and of said trustee therein be fixed. The bankrupt filed an answer to said petition (R. p. 28) claiming both that the trustee had no interest whatever in said policies and also that the same had a cash surrender value, upon payment of which he was entitled to hold the same free from the claims of creditors. Thereupon an order was made (R. p. 35) for the taking of the evidence and proof before a Special Master, he to report the same with his findings and conclusions, which he did, finding in favor of the trustee (R. p. 132). Said findings were confirmed by the District Court (R. p. 162, Opinion p. 152).

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The issue which was raised by said petition and answer was, in short:—Did said policies, which had no cash surrender value by their terms, come within the proviso of Section 70—a—5? The trustee, on the one hand claimed that the policies were not within the proviso, also asserting that they had a large actual value, much greater than the insurance company would pay, and that under some of the provisions of the policies, they were not life insurance policies at all, but investments. The bankrupt, on the other hand, claimed that the policies were within the proviso, because the insurance company was willing to give a certain sum in cash for the surrender of the same, although not provided for by the terms of the policies, the sum being fixed according to a definite custom adopted by it. He also asserted that the trustee had no interest whatever in policies which by their terms did not provide for a cash surrender value.

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The above procedure for the determination of the

question at issue was adopted with the consent of both parties, as being the most summary and effective way of determining the question.

16 The bankrupt's claim that the policies, having no cash surrender value by their terms, did not pass to the trustee is not only inconsistent with his other claim above mentioned but cannot be substantiated because there never has been any case in which such a rule has been laid down where the policy had any value for any purpose, and he proved in this case by his own witness that the policies did have a large actual value. The Welling and Slingluff cases (*see post*) are also authorities on the proposition that the policies did pass to the trustee notwithstanding that they had no cash surrender value by their terms, and the Court below held with the trustee on this 17 proposition. (R. p. 195).

Upon the hearing before the Special Master, there were offered in evidence the policies in question which appear in the Record (pages 77-93. A reference to those exhibits will show on their face that they provide, respectively, for a straight insurance upon the life of Mr. Mertens and that in case of lapse no surrender value will be given, except by way of a paid-up policy, which will be "without participation in profits" (R. Fols. 233, 402). It will also be noted that on the back of the policies are a 18 number of endorsements and that by the endorsement No. 5 (R. Fol. 239) it is provided that if the insured shall survive the tontine period, i. e., twenty years, he may then exercise one of several options. Among those options it is provided that the insured may then take out a paid-up policy for an amount, or may withdraw in

cash a sum, which under each policy is made up as follows: First, a definite sum mentioned in the option, and second, in addition thereto, the surplus apportioned by the Society to said policy.

Upon the hearing, the bankrupt swore Mr. George E. Brainard, an agent of the Insurance Company, as an expert, and from his testimony (R. p. 45, et seq.), it appeared that the Company had made it a practice under this form of policy to pay the insured money for a surrender; that is, that the Company which was only obligated under the terms of the policy to issue to the one surrendering the policy a paid-up policy, which was without participation in profits, had made it a practice to determine the value which this substituted paid-up policy would have, and to pay that value to the insured upon surrender of the tontine policy. In other words, the Company simply avoided the extra work of issuing the paid-up policy in strict accordance with the terms of the tontine policy, which paid-up policy the insured could then surrender, by paying the insured directly the value of such a substituted paid-up policy without issuing it at all; but even this privilege could be obtained only in case the policy had lapsed (R. Fol. 144), *and in so surrendering the policy the holder would lose all rights in the profits,* whereas, if he continued to the end of the twenty year tontine period he would obtain those profits. The latter right is a very valuable element of the insurance. The bankrupt claimed that this practice of the Company gave to the policies in question such a cash surrender value, although not mentioned in the policies themselves, as would bring them within the proviso of Section 70.

On cross-examination by the trustee, however, it was shown by this witness that such a policy had an actual value much greater than the amount which the Company would so pay for it (R. Fol. 180, et seq.). As an in-
22 stance, take the case of the policy No. 274,445, Record, page 77. The amount which the Company, at the time of the bankruptcy, August 18, 1903, would give for this policy was only $5905.65. This is the sum which the bankrupt alleges is its cash surrender value, and on payment of which he claims to be entitled to the policy. But by the simple payment of the premium of $293, which was made by the Receiver in Bankruptcy on September 8, 1903, this policy was carried to the end of its tontine period which happened six months later, on March 8, 1904, and it then became worth the sum of $11,318.40,
23 said latter sum being made up of the $6046.40 mentioned in its option, No. 5, plus $5272. which was the surplus apportioned to the policy by the Company, said surplus being the money equivalent of its right to participate in profits. *Hence, the payment by the receiver of $293. and a holding on for about six months has added to the value of that one policy $5412.75, a sum that either goes to the estate for creditors, or to the bankrupt.* If the decision below stands, the bankrupt makes this vast profit. Consequently, as testified by the witness, it was evident that this policy had at the time of the bank-
24 ruptcy a much larger actual value than the $5905.65 which the Company would give for the paid-up policy which the Company was obliged to issue in case the tontine policy in question lapsed; and the witness also testified that there was a ready market for such securities (Fol. 182). What is said of the foregoing policy is

true of all the others, except that it is a more striking example on account of the fact that the tontine period was nearer completion at the time of the bankruptcy.

It is evident, therefore, that the contention of the bankrupt, as sustained by the Court below, would secure the 25
policy to the bankrupt for $5905.35, enabling him in six months, by the payment of $293, to make the large additional profit of $5412.75 at the expense of the creditors; because the $5412.75 is the avails of the right to participate in profits, a vested right owned by the bankrupt at the time of the bankruptcy, and conditioned only upon carrying the policy to the end of the tontine period. It is also evident that the nature of the tontine policy is such that the premium which is paid each year is really paid for two purposes. Part is paid for the straight insurance, provided for by the face of the policy, payable 26
in case the insured dies; the other part is a contribution to a fund which is made up from premiums obtained from policies of the same class, which fund accumulates until the end of the tontine period of twenty years; but if the holder of any policy in that class surrenders the policy prior to the end of the twenty years, he loses all right to participate in the fund, and the fund at the end of the twenty years is divided among the policy holders who continue their policies until that time. (R. Fols. 407, et seq.). The trustee contended that the above right 27
accruing at the end of twenty years was to all intents and purposes not insurance, but really an investment.

The Special Master and the District Court having held with the trustee in all of the foregoing contentions, the bankrupt thereupon filed an appeal and also a petition for review to the Circuit Court of Appeals for the Second

Circuit; thereafter the case was argued and the Circuit Court determined that it had no jurisdiction to hear the appeal and dismissed the same, but upon the petition for review, reversed the order of the District Court in an opinion which appears in the Record at page 193.

In its opinion, at page 196, the Circuit Court refers to the case of in re Welling, 113 Fed. Rep., 189, and it says:

> "The Circuit Court of Appeals for the "Seventh Circuit had the same questions before "it on policies identical in their provisions and "on evidence showing that there was an actual "specific sum of money which the insurer was "willing to pay in cash for its surrender," and then says that it, the Second Circuit, would be "inclined to concur with these views and to sus- "tain the conclusion of the District Judge in "the cause at bar" * * * "were it not "for a subsequent expression of opinion by the "Supreme Court. This is found in Holden "vs. Stratton, 198 U. S., 214." The opinion of the Circuit Court then quotes the opinion of the Supreme Court referred to and continues:
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> "Although this is manifestly obiter to the "questions decided in Holden vs. Stratton, it "is such an explicit declaration of the views "of the Court upon the question raised here "that we should hesitate to disregard it, and "therefore have concluded to reverse the order "under review and remand the cause with in- "structions to give the bankrupt an oppor-

"tunity to pay and secure the actual value "which would be paid on surrender according "to the uniform practice of the Company. *By "such a disposition of the cause the decisions "in the two circuits will not be uniform and, "although there is no appeal, our action upon "petition to review may be reviewed on cer- "tiorari.*" (Italics are ours.)

Returning to the grounds on which this application for review is made, as set forth at the opening of this petition, petitioner now alleges that it is indisputably evident that the decision by the Second Circuit is absolutely contrary to the decision of the identical question upon policies exactly similar by the Seventh Circuit as set down in the case in re Welling, 113 Fed. Rep., 189, and the strange condition exists of the inhabitants of the Second Circuit of the United States being governed by a rule of law which is directly contrary to the rule of law governing the inhabitants of the Seventh Circuit, although both of those rules of law are simply the interpretation of the same Federal Statute, Section 70 of the Bankruptcy Act of 1898. Said rule is also contrary to the rule laid down in the case of in re Slingluff, 106 Fed. Rep., 154, Maryland District Court.

It is also undoubtedly true, as shown by its opinion, above quoted, that the Circuit Court of Appeals itself considered the rule laid down in the case of in re Welling, supra, to be the correct rule, and that it desires the decision in question to be reviewed by the Supreme Court.

It is also indisputably true that the Supreme Court

has not decided the question. The case of Holden vs. Stratton, 198 U. S., 214, upon which the order of reversal was based, was clearly not intended by the Supreme Court to be a precedent upon the matter in controversy, because the Supreme Court in that part of its opinion quoted by the Circuit Court of Appeals, at page 197 of the Record, itself so stated, as follows: "However, "whatever influence that construction may have, as the "question is not necessarily here involved, we do not ex- "pressly decide it." The Supreme Court thereby held that such expression was merely obiter and the Circuit Court of Appeals, although following it, said that it "is manifestly obiter." That case of Holden vs. Stratton involved simply the construction of Section 6 of the Bankruptcy Act, the question being as to whether property exempt under a State statute was also exempt under said Section 6 of the Bankruptcy Act, the property involved being a life insurance policy similar to the one in the case at bar. But it is evident that the construction of Section 70, which is the question in the case at bar, was not involved in the case of Holden vs. Stratton, and it is also evident that the peculiar nature of a tontine policy was not brought out, elucidated and discussed before the Supreme Court in that case.

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It is to review the ruling of the Circuit Court of Appeals of the Second Circuit on this question that a writ of certiorari is applied for and the question is of paramount importance, involving, as it does, a very common form of policy and because of the conflicting decisions in the several circuits, and in so applying this petitioner claims that the Circuit Court of Appeals erred in holding:—

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First, that the policies in question were embraced within the meaning of the proviso contained in Section 70-a-5 of the Bankruptcy Act.

Second, that the policies had a cash surrender value.

Third, that after the adjudication, the bankrupt had any interest whatever in the policies. 31

Fourth, that the trustee was not the absolute owner of said policies free and clear from all claims of the bankrupt.

Fifth, in refusing to affirm the order directing the bankrupt to execute an assignment of said policies to the trustee.

Sixth, in refusing to affirm in all respects the order made by the District Court.

And so it is that your petitioner contends that by reason of the decision in the case at bar and the others so cited, error was committed and that there is a contrariety of opinion and not a uniform administration of the bankruptcy act (as necessary as uniformity in the Act itself, required by Section 8, Subsection 4, Article 1, of the Constitution of the United States), as to the grave and important question, to wit, the rights of a trustee in bankruptcy in policies of the nature hereinbefore set forth, being policies of insurance so-called, which do not provide for a cash surrender value and which are in fact partially investments and which have a much larger actual value than the company issuing the same will pay therefor. 32 33

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this

Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record in all proceedings in said Circuit
40 Court of Appeals in the case therein entitled, "In the Matter of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mertens, individually and as composing the co-partnership firm of 'J. M. Mertens & Co.', bankrupts," on the petition of Jacob M. Mertens for review, being No. 30 on the calendar of said court for the term beginning October, 1905, to the end that said case may be reviewed and determined by this Court as provided by law; and that the judgment of the said Circuit Court of Appeals and its decision and mandate in said case may be so modified and reversed as to deny the
41 petition for review filed by said Jacob M. Mertens to that Court in Bankruptcy and affirm the order and judgment of the District Court in the premises.

And your petitioner will ever pray.

ALBERT K. HISCOCK,
Trustee in Bankruptcy, &c.,
Petitioner.

WILL B. CROWLEY,
Of Counsel for Petitioner.

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UNITED STATES OF AMERICA,
Northern District of New York, } ss:
County of Onondaga,

Will B. Crowley, being first duly sworn, deposes and says: That he is one of the counsel for Albert K. Hiscock, the trustee in bankruptcy of the estate of Jacob M. Mertens and the petitioner named in the foregoing petition; that he has read the same and knows its contents and that the facts therein stated are true to his own knowledge, except as to those matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

WILL B. CROWLEY.

Sworn to before me this 17th
day of January, 1906.
MEAD V. Z. BELDEN,
Notary Public,
Onon. Co., N. Y.